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ABSTRACT

Noting that the Supreme Court in 1997 considered the question of whether the Internet would be regulated by the government as broadcasting or whether it would remain as free as newspapers, this paper examines the difficulty involved in applying old law to new technology. It also notes that while journalism education generally has accepted broadcasting as a form of journalism, Congress and the Supreme Court do not view them equally under the First Amendment, and this has led to quite different legal precedents. It then reviews the laws permitting post-publication punishment for expression that infringes on the rights of others in the areas of printing (libel and privacy law), broadcasting (the Fairness Doctrine), cablecasting ("must carry" provisions), the Internet (including the Communications Decency Act), the student press (the "Tinker v. Des Moines Independent School District" and the "Hazelwood School District v. Kuhlmeier" cases). The paper concludes that the Supreme Court must ultimately decide whether it will follow the principles of Hazelwood or of "Reno v. American Civil Liberties Union" as it adjusts medium-specific rulings of the past to media convergence of the future. Contains 76 notes; an appendix contains a summary of the paradigm shift in communications from product to process and from delivery to interaction. (RS)

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# Regulation of Information:

# Does Freedom of Expression Include the Internet?

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# Regulation of Information:

# Does Freedom of Expression include the Internet?

The Supreme Court in 1997 considered the question of whether the Internet would be regulated by the government as broadcasting or whether it would remain as free as newspapers. A Clinton administration lawyer argued the Internet "threatens to give every child a free pass to every adult bookstore and video store," while a lawyer for a coalition of civil liberties and computer industry groups described the Internet as a "democratizing and speech enhancing" medium, distinctive as a forum for worldwide conversation at little or no cost.[1] The Court declared the Communications Decency Act unconstitutional,[2] but it left open for debate the basic regulatory question.

This chapter examines the difficulty involved in applying old law to new technology. The problem is not obvious; it is subtle, but it involves the interpretation of some sacred beliefs: freedom of expression; freedom to choose; freedom to read; freedom to think. The Internet's introduction of interaction into models of mass media places the audience in a position of power it has never held before. Government limitations on the media in the past have restricted publishers; in an interactive medium, government limitations restrict the public as well. Because this is a problem that the traditional media law paradigm can't solve, some experts are emphatically calling for the abolishment of the Federal Communications Commission's authority over electronically broadcast content.[3]

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[1] Linda Greenhouse, "Spirited Debate in High Court on Decency Rules for Internet," *The New York Times*, 20 March 1997, 10B.

[2] *Reno v. American Civil Liberties Union*, 96 U.S. 511, (1997) <http://laws.findlaw.com/US/000/96-511.html>.

[3] Michael G. Gartner, "Buncombe, Broadcasters & The First Amendment" (speech presented at the Practicing Law Institute, New York City, Nov. 10, 1988). Gartner is editor of the Ames, Iowa, *Daily Tribune* and former president of NBC News; Donald Lively, "Deregulatory Illusions and Broadcasting: The First Amendment's Enduring Forked Tongue," 66 *North Carolina Law Review* 963 (1988).

Because the government's rationale for limiting free speech in broadcasting is based on the defunct concept of spectrum scarcity[4] and the Internet combines attributes of all other media[5] while introducing mass interaction,[6] the electronic communications industry should be deregulated, according to Law Professor Donald E. Lively. As the mass media paradigm shifts from scarcity to infinity and one-directional delivery of information to two-directional construction of meaning,[7] even the FCC has recognized the pitfalls of censorship[8] and cultural imperialism.[9] The government's convoluted attempt to stretch its power to regulate radio in the 1930s and '40s to regulate television, cable, satellite, microwave and the Internet in the 1980s and '90s has begun to sound like Orwellian doublespeak as attempts to preserve diversity have in fact limited it.[10] More than half the U.S. population now gets its news from a government- regulated electronic medium while newspapers, the only news medium to enjoy complete First Amendment protection, continue to shrink in readership.[11]

The former president of NBC News, Michael G. Gartner, made a persuasive plea to lawyers and print journalists in 1988 to stop thinking of broadcasting as different from

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4 Donald Lively, "The Information Superhighway: A First Amendment Roadmap," *Boston College Law Review*, September 1994.

5 Ibid., 971.

6 Ibid., 974.

7 107 *Harvard Law Review* 1062, 1080-1083 (March 1994).

8 Ibid, 972.

9 Ibid, 968.

10 Ibid., 970.

11 Charles D. Ferris and Terrence J. Leahy, "Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment," 38 Catholic University Law Review 299, 315 (1989).

printing when the topic was the First Amendment.[12] He presented a hypothetical, yet typical, anecdote to illustrate the government's influence over news coverage — influence that would not even be attempted at American newspapers — because of the government's policy of licensing and regulating broadcasters through the Federal Communications Commission. English and American newspapers broke away from government licensing and regulation nearly 300 years ago; today, as more and more electronic forms of communication fall under the FCC's umbrella, the specter of government censorship is very much alive.

> The networks have been conditioned, like Pavlov's dogs, to react when a Congressman calls. Indeed, just the threat of a call — the rumor from an aide that his boss will soon be calling — or a statement or, God forbid, a hearing can sometimes force the broadcast industry into submission on a question of policy, programming, or scheduling. Broadcasting today is essentially a public-policy laboratory in which the Congress feels it can play with impunity. For lovers of the First Amendment, it is a nightmare.[13]

One example Gartner cites is Congress' practice of voting into law the advertising rate for its own advertising, which, of course, is the lowest unit rate a particular station charges. Another is new technology's willingness to trade its freedom for profits.[14]

The Supreme Court has been instrumental in defining the legal limits of mass communication since the landmark 1964 *New York Times v. Sullivan* case when it set modern standards for press freedom based on the First Amendment to the U.S. Constitution.[15] This chapter traces the history of the Court's stark contrast between printing and broadcasting, and it presents recent evidence that these contrasts are being obliterated by media convergence on the Internet with significant implications for First Amendment law.

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12 Gartner.

13 Ibid., 8.

14 Ibid., 7, 11.

15 The First Amendment prohibits Congress from enacting any law that abridges freedom of expression, and the Fourteenth Amendment prohibits any state from abridging the privileges or immunities of U.S. citizens.

Print journalism is clearly protected from government control by the First Amendment and the traditional role that newspapers have played in American public affairs. For the first 150 years of U.S. history, newspapers and journalism were synonymous. News during this era was defined as "what newspapers printed." What has happened during the past 70 years to confound this definition is the fact that many other new kinds of mass media publish news, too. First radio, then television, cable and now the Internet have claimed the title "mass communication medium," which includes the dissemination of news.

Many journalism schools have tried to keep pace with the growth of electronic media by including broadcasting in their curricula, "mass communication" in their names and "mass media law" in their journalism law courses. While journalism education generally has accepted broadcasting as a form of journalism, Congress and the Supreme Court do not view them equally under the First Amendment, and this has led to quite different legal precedents. These differences once seemed logical because of the media's different technological attributes, but the Internet is combining the technology of print and broadcasting, and this media convergence demands a more consistent legal policy for all U.S. mass communication.

Despite the First Amendment guarantee of free expression, Congress and states have passed numerous laws permitting post-publication punishment for expression that infringes on the rights of others. These laws, which apply to all media, are not forms of prior restraint censorship, but they can have a chilling effect on expression, which is another form of censorship. The purposes of the following summary of these laws is to show that they adequately cover the mass media, including electronic media, quite comprehensively without the need for the FCC to monitor and prescribe content. Proponents of deregulation argue the FCC should concern itself only with technical matters such as power and frequency allocations.

## Printing

Printing was the only form of mass communication from the ratification of the

Constitution's Bill of Rights in 1791 until the advent of radio in the 1920s. Current print journalists, like their predecessors, are free from prior government restraint, but they must be knowledgeable about libel, privacy and copyright to stay out of trouble after publication. Libel is a defamatory statement that exposes a person to public hatred, shame or ridicule. Privacy is the right to be left alone, free from publicity, and copyright law gives authors the right to protect and profit from their work without being affected by unfair copying. As these laws were applied to broadcasting, broadcasters became regarded as publishers of information.

There are five legal elements to libel: The statement must be published to a third party. Someone must be identified, and this can be accomplished without the use of a name. That person must be defamed by a false statement of fact — not an opinion. Finally, the plaintiff must prove the publisher is at fault and the publication led to actual damages.

There are four defenses to a charge of libel: The first is a constitutional defense that is based on the warrant that citizens are free to discuss public issues and public officials in an "uninhibited, robust and wide open" forum.[16] A public official is one who has substantial responsibility for or control over governmental affairs. A public official must prove actual malice — "that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false."[17]

Defenses against libel suits were clarified in the 1964 Supreme Court opinion *New York Times v. Sullivan*. The case is based on an editorial ad, titled "Heed Their Rising Voices," which claimed police violence and harassment against black civil rights leaders at Alabama State College in Montgomery, Alabama. Police Commissioner Sullivan claimed he had been libeled because there were errors in the ad: police had not ringed the campus, though they were there in large numbers; students sang the National Anthem, not "My Country 'Tis of Thee"; and students had not refused to register, but they had

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16 *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

17 Ibid., 255.

boycotted classes. The Court's opinion, written by Justice William Brennan, said:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to ... "self-censorship." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."[18]

Public figures fall under the same guidelines if they seek the public limelight or have positions of persuasive power and influence or inject themselves into a public controversy. They, too, must prove actual malice, which is a high threshold, to win a libel suit. The Fourteenth Amendment prohibits states from infringing on citizens personal liberties guaranteed by the Bill of Rights, the first 10 amendments to the U.S. Constitution.

The 1967, *AP v. Walker* case, which was decided with *Curtis Publishing. v. Butts*, extended First Amendment protection to those reporting on public figures. The Associated Press had reported that retired Major General Edwin Walker had taken command of a crowd and encouraged rioters to use violence to prevent the enrollment of James Meredith, an African American, at the University of Mississippi in 1962. Walker claimed he was not a public official and therefore did not need to prove actual malice. The Court disagreed, ruling that Walker had thrust "his personality into the 'vortex' of an important public controversy."[19]

University of Georgia Athletic Director Wally Butts sued *the Saturday Evening Post* over an article that accused him of giving information to University of Alabama Coach Paul Bryant to fix the outcome of the 1962 Georgia-Alabama football game. The article was based on a telephone conversation overheard by an Atlanta insurance salesman because of an electronic error. Butts claimed "the magazine had departed greatly from the standards of good investigation and reporting and that this was especially reprehensible,

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18 Ibid., 279.

19 *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 146 (1967).

amounting to reckless and wanton conduct."[20] The Court ruled the coach was a public figure, however, and that he must prove actual malice to win his libel suit.

The legal pendulum began to swing toward restrictions in 1974, when the Supreme Court ruled in the *Gertz v. Welch* case[21] that private persons who are dragged unwillingly into the public spotlight by circumstances do not automatically become public figures. Consequently, private persons need only prove negligence, often defined as carelessness, to win a libel suit. States can set particular standards, under the Constitution, but they must require the element of fault through negligence. The Gertz decision attempts to draw a line that allows private citizens to remain private even when they are involved in a public event or controversy.

Gertz was a Chicago lawyer representing the parents of a son who had been shot and killed by a police officer. A magazine writer covering the case called Gertz a Leninist and Communist-fronter trying to discredit the local police. The Supreme Court ruled that Gertz was a private person — not a public figure — and therefore, he did not need to prove actual malice but only negligence, which is much easier to do than proving the writer or publisher had knowledge of falsity or acted with reckless disregard for the truth.[22] Negligence is sometimes defined as failure to follow accepted standards of professional conduct.

The three other defenses against libel suits are conditional privilege, truth and fair comment. Conditional privilege is fair and accurate reporting of court officers, employees, witnesses and others who participate in trials, legislatures and other government meetings. Truth is a traditional American defense, but truth ultimately can be hard or impossible to prove. Fair comment is a common law tradition that permits opinions concerning matters of public interest such as plays, parades, restaurants and hotels.

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20 Ibid., 138.

21 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974).

22 Ibid., 352.

In privacy law, which is only about 100 years old, truth is not a defense. When private persons claim that a true statement about them should not have been published, the main defense for the journalist is news value. If the public's interest outweighs the individual's privacy, than publication is justified. If the publication is not newsworthy, the act is an invasion of privacy.

Libel and privacy are the two most problematic areas of law for working journalists, but they also must guard against unfair use of copyrighted material and obscenity.

Two cases, just five years apart, illustrate how differently the Supreme Court views broadcasters as opposed to newspaper publishers. The *Red Lion Broadcasting Co. v. FCC* (1969) and *Miami Herald Publishing Co. v. Tornillo* (1974)[23] cases had a lot in common: Each involved published criticism of a public figure, each medium refused to publish a reply from the person verbally attacked and the question of fairness was the common issue. The Supreme Court said it would not interfere with an editor's right to decide what to print or not to print, but because access to the nation's airwaves was limited by "spectrum scarcity," the broadcasting company must allow the person attacked equal air time for reply.

## Broadcasting

The Court has considered broadcasters to be stewards of a limited public resource, while it has considered print journalists to be citizens participating in free and open debate of public issues. The limited number of broadcast frequencies is the basis of the Federal Communication Commission's Fairness Doctrine, which the FCC stopped enforcing in 1987[24] and which continues to be a subject of debate. Congress and the Supreme Court have never backed away from the decision that broadcasting can be licensed and regulated by the government, however, and this includes regulation of content.

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23 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, (1974).

24 Ferris and Leahy, 299.

The Fairness Doctrine requires that broadcasters present issues of public concern and that they present each side of those issues. The FCC charged Red Lion with violating the doctrine in 1964 when it broadcast personal attacks on Fred Cook, author of a book titled *Goldwater – Extremist on the Right*, and failed to send him a tape, transcript or summary of the broadcast and provide reply time on the air.[25]

The Fairness Doctrine evolved informally from years of decisions by the Federal Radio Commission, which was created in 1927, and later the FCC, which replaced the FRC in 1934, to provide citizens "equal opportunities" to the nation's airwaves. In 1959, Congress amended Section 315 of the Communications Act to state that broadcasters were obligated to "operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views or issues of public importance."[26]

The FCC's first formal expression of this idea was in 1949:

> In approaching (editorializing by broadcast licensees), we believe that the paramount and controlling consideration is the relationship between the American system of broadcasting carried on through a large number of private licensees upon whom devolves the responsibility for the selection and presentation of program material, and the congressional mandate that this licensee responsibility is to be exercised in the interests of, and as a trustee for the public at large which retains ultimate control over the channels of radio and television communications. One important aspect of this relationship, we believe, results from the fact that the needs and interests of the general public with respect to programs devoted to new commentary and opinion can only be satisfied by making available to them for their consideration and acceptance or rejection, of varying and conflicting views held by responsible elements of the community. And it is in the light of these basic concepts that the problems of insuring fairness in the presentation of news and opinion and the place in such a picture of any expression of the views of the station licensee as such must be considered.[27]

In 1964, Red Lion Broadcasting Company's Pennsylvania radio station WGCB carried a 15-minute broadcast by the Rev. Billy James Hargis as part of a "Christian Crusade" series. Hargis said Cook had been fired by a newspaper for making false

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25 *Red Lion v. FCC* at 371-372.

26 Public Law No. 274, 86th Congress 1959.

27 *Editorializing by Broadcast Licensees*, 13 FCC 1246, at 1247 (1949).

charges against city officials, that Cook had worked for a Communist-affiliated publication, that he had defended Alger Hiss and attacked J. Edgar Hoover and the CIA, and now he had written a book to "smear and destroy Barry Goldwater."[28] The station refused to give Cook reply time and argued the Fairness Doctrine was a violation of its First Amendment rights.

The FCC clarified the Fairness Doctrine during the *Red Lion* litigation as follows:

> When during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.[29]

Despite regulatory language that clearly would not be upheld if applied to printing, the Court said the FCC did not exceed its authority, which was expressed by the sponsor of the Radio Act of 1927:

> In the present state of scientific development, there must be a limitation upon the number of broadcasting stations, and licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary to the public interest, or would contribute to the development of the art.[30]

Before 1927, the allocation of frequencies was left to the private sector and the result was chaos. Without government control, the medium would be of little use, the Supreme Court concluded, because of the cacophony of competing voices, none of which could be heard clearly or predictably. Congress decided to allocate frequencies to competing applicants who would best serve the public's interest.

By 1969, the Radio Television News Directors Association joined Red Lion in making a First Amendment defense against FCC regulation. No person may be prevented from saying or publishing what he or she thinks, the RTNDA argued, or from refusing to

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28 Ibid., 371.

29 Ibid., 373-374.

30 Ibid., 377.

give equal weight to the views of opponents.

The Supreme Court disagreed, upholding government regulation of broadcasting, including the Fairness Doctrine, based on the scarcity of frequencies available for clear and predictable communication. The ruling included the following illustrative comments:

√ Differences in characteristics of new media justify differences in First Amendment standards.[31]

√ It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[32]

√ Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[33]

√ The Commission is more than a traffic policeman concerned with the technical aspects of broadcasting.[34]

Despite support for content regulation from the Supreme Court and Congress, the FCC directors placed a moratorium on most of the Fairness Doctrine in 1987. After extensive hearings on alternatives, the FCC concluded the Fairness Doctrine created a "chilling effect" from fear of government punishment, and thus tended to discourage broadcast coverage of controversial public issues, the opposite of its professed purpose. The FCC said the Fairness Doctrine encouraged too much governmental interference in areas of broadcast freedom of expression.[35] Providing equal time for opposition to all topics of public concern was too burdensome, the FCC reasoned, and broadcasters were being discouraged from airing controversial topics. The Fairness Doctrine still applies to personal attacks in the context of controversial public issues and political editorializing.

In 1972, a candidate for political office tried to apply the Fairness Doctrine to a newspaper. The *Miami Herald* had printed two editorials opposing Pat Tornillo for the Florida House of Representatives. The editorials contained these comments:

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31 Ibid., 386.

32 Ibid., 390.

33 Ibid., 392.

34 Ibid., 395.

35 2 FCC Red Vol. 17, 87-264, 5272, 5294 (Aug. 17-28, 1987).

> This is the same Pat Tornillo who led the (Classroom Teachers Association) strike from Feb. 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.
>
> We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.[36]

The newspaper refused to print Tornillo's replies to the editorials, so he sued based on a 1913 "right of reply" Florida statute that granted a political candidate a right to equal space to answer criticisms and attacks on his record by a newspaper.

The *Herald* claimed the law was void on its face because it purported to regulate the content of a newspaper in violation of the First Amendment. Furthermore, the newspaper argued the law was void for vagueness because no editor could know exactly what words would call the law into effect.

Tornillo and media-access proponents argued the government had an obligation to ensure that a wide variety of views reached the public. When the First Amendment was ratified in 1791, they argued, the press presented a broad range of opinions, entry into publishing was relatively inexpensive, and pamphlets and books provided significant alternatives to the newspapers.[37] Tornillo in essence argued that channels of print communication, like broadcast frequencies, had become scarce.

The Court's opinion allowed that the elimination of competing newspapers, and the concentration of media ownership were components of a trend toward concentration of control of outlets to inform the public. "The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership."[38]

Tornillo argued, "Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from government

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36 *Miami Herald v. Tornillo*, 244.

37 Ibid., 248.

38 Ibid., 250.

interference under the First Amendment does not sanction repression of that freedom by private interests."[39]

In its decision, the Court cited two previous rulings: *In CBS v. Democratic National Committee* (1973), the plurality opinion noted, "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers."[40]

Furthermore, *AP v. United States* (1945) clearly established the principle that any compulsion to print that which reason indicates should not be printed is unconstitutional. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues, it cannot be legislated."[41]

Returning to the case at hand, the Court concluded:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statue, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'[42]

The Supreme Court ruled the Florida right-of-reply statute unconstitutional, closing its opinion with these comments:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free

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39 Ibid., 252.

40 Ibid., 255.

41 Ibid., 256.

42 Ibid., 257 (citation omitted).

press as they have evolved to this time."[43]

Twenty years ago, the Supreme Court reaffirmed that broadcasting content could be regulated and ordered broadcasters to treat everyone fairly, but the Court also ruled the government could not regulate newspaper content or order newspapers to be fair. The warrant behind these opposing rulings is spectrum scarcity — only so many frequencies are available for broadcasting, so they must be regulated by the government to serve the public interest. Tornillo was ahead of his time by arguing that print media are becoming scarce while broadcasters, or at least electronic forms of communication, are proliferating.

**Cablecasting**

The nature of television is changing, too. What started as community antennas to improve broadcast network reception in rural areas has become a major television industry that is replacing traditional broadcasting. In the 1960s, the FCC saw cable as a way to expand television service to all areas of the nation. Cable gradually did this, but in an unexpected way.

First, the development of microwave television transmissions in the 1970s and satellite transmissions in the 1980s enabled cable operators to import signals from distant broadcasters, and second, this enabled superstations such as TBS and pay-TV stations such as HBO to begin providing national programming through cable networks, which were available only through coaxial cable and could carry hundreds of channels because cable is not limited by air frequencies.[44]

Because of this channel proliferation, cable operators gradually moved from providing extended reception to local broadcasters to providing cable channels that competed with traditional network broadcasters and their local affiliates. Additional superstations such as WGN and cable channels such as MTV, ESPN, TNT, C-Span, The

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[43] Ibid., 258 (note omitted).

[44] Teeter and Le Duc, supra note 8 at 426-431.

Family Channel, Nickelodeon, Arts and Entertainment, Black Entertainment Television, Court TV, The Discovery Channel, American Movie Classics, Comedy Central, The Learning Channel and the Weather Channel have become so popular that cable TV is now moving into major cities where over-the-air reception of local broadcasters is not a concern.[45]

At first, cable companies carried broadcasters' signals without compensating the broadcasters, but as competition for viewers increased, this lack of compensation became a hotly debated issue. The FCC responded by creating an elaborate system of restrictions on the importation of television signals to major markets, but the system was rescinded after the Copyright Act of 1976 established the Copyright Royalty Tribunal to collect a percentage of each cable operator's gross subscriber revenues to compensate the program suppliers.[46] One major FCC cable rule remaining was a requirement that cable systems must carry all local stations their subscribers could receive over the air, but even this rule is being challenged as cablecasters demand First Amendment rights.

In 1994, the Supreme Court heard arguments concerning the FCC's must-carry provision in *Turner Broadcasting System, Inc., v. Federal Communications Commission.* TBS and other cable programmers and operators challenged the constitutionality of the "must-carry provision," which was codified by Congress in the Cable Television Consumer Protection and Competition Act of 1992. The Court ruled the United States District Court of Columbia erred in granting summary judgment in favor of the government because "there are genuine issues of material fact still to be resolved on this record."[47]

The ruling was based on the assumption that broadcast television was in economic peril — that cable had become a threat to traditional broadcasting — and the

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45 *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445, 13 (1994).

46 Public Law 94-553, 90 Stat. 2541 2594-2602.

47 *Turner Broadcasting*, 114 S. Ct., 87.

government's must-carry rule complied with the standard of scrutiny set forth in *United States v. O'Brien, 391 U.S. 367:*

> Under O'Brien, a content-neutral regulation will be sustained if it furthers an important governmental interest that is unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[48]

Spectrum scarcity was not directly considered in this case because cablecasting does not use over-the-air frequencies. In fact, this case emphasized that cable companies were not technically broadcasters and therefore did not automatically fall under guidelines of the Communications Act and the FCC. Congress acknowledged this by enacting legislation in 1992 to protect broadcasting from cable competition. The Court's opinion said:

> The paucity of evidence indicating that broadcast television is in jeopardy is not the only deficiency in this record. Also lacking are any findings concerning the actual effects of must-carry on the speech of cable operators and cable programmers — i.e., the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters.[49]

This case clearly defines television in terms that are no longer synonymous with network broadcasting. A careful review of the development of cable TV over the past 25 years indicates the Court, Congress and the FCC have been wrestling with the ironic concept of regulating and micromanaging electronic media that no longer represent a scarce national resource. In the meantime, many metropolitan newspapers have merged or closed, leaving most American cities with only one newspaper. TBS and other cable companies are forcefully arguing they are now America's main channels for public discussion of public issues and the First Amendment forbids the U.S. Congress from restricting such discussion by controlling their content through the FCC.

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48 *Ibid.*, 6.

49 *Ibid.*, 86.

**The Internet**

If the above changes in mass communication aren't enough to justify a re-evaluation of the FCC, the Internet is blurring traditional distinctions between printing and broadcasting. As newspapers, broadcasters and cablecasters go online, printing, broadcasting and cablecasting are merging into one multimedium that will demand one government policy based on freedom or regulation of speech.[50] The Internet also is ushering in an unprecedented level of mass media interaction that is affecting the practice and theory of mass communication. (See Appendix A for a graphic summary of the paradigm shift in communications from product to process and from delivery to interaction.) The *Red Lion* and *Miami Herald* media decisions clearly were based on technological differences, including spectrum scarcity. Today, cable companies can provide more audio-visual programming to American households than network broadcasters, and the Internet promises do the same with printed text while introducing two-way communication that enables reader and viewers to also act as publishers. The Internet is the culmination of media convergence.

This convergence is raising many issues, but two are paramount: As formerly different media converge in a two-directional communication medium that provides text, audio, video and sound from countless sources (channels), any government policies based on traditional differences among media and spectrum scarcity are quickly becoming obsolete. With the popular adoption of the Internet,[51] scarcity of channels of communication simply does not exist, and the government can no longer justify greater regulation of broadcasting than print under the warrant of spectrum scarcity. Newspapers are more scarce than electronic publishers. In "The Information Superhighway: A First Amendment Roadmap," Donald Lively summarizes the legal problem with traditional definitions of media:

> Medium-specific analysis comports with Justice Jackson's observation, nearly

50 Jack Morris, "The Internet and Information: The Convergence of Media on the Internet May be Changing the Practice of Journalism" (research paper, University of Missouri, November 1997).

51 Ibid.

> half a century ago, that media "have differing natures, values, abuses, and dangers. Each, in my view, is a law unto itself." Attention to difference has resulted in as many First Amendment standards as there are identifiable media forms. This focus on media distinction, however, has become miscalculated, as media structure and capability increasingly reflect convergence rather than divergence.[52]

The Internet is an electronic network of mainframe and personal computers connected by telephone wires, fiber-optic and coaxial cables, and microwave transmissions. It was initially funded by the Department of Defense in the 1960s to create alternate routes of computer communications and backup systems in the event of an attack on United States databases.[53] During the past two decades, research centers and universities began using it to share information, and more recently, private companies such as America Online, CompuServe and Prodigy have begun marketing public access to the Internet.

Various forms of copying, including trademark infringement and copyright infringement[54] have become issues on the Internet because of the nature of computer-mediated communication, which by design requires the ability to copy electronically. E-mail is copied from a sender's computer to a receiver's computer-storage system, which often does not belong to the receiver but to a research center, university or commercial Internet access provider. To read e-mail or postings to a bulletin board or discussion list or to receive any print, sound or pictures from a Web site, the receiver must command his or her computer to make a copy of the document and display it on the receiver's computer screen. Technically speaking, Web sites do not send data to Internet users; they make part of their computer storage systems open to other users who make copies of the files.

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52 Lively, "The Information Superhighway: A First Amendment Roadmap," p. 1067 (footnotes omitted).

53 Byron Marchant, "On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-Line World," 39 *Howard Law Journal* 477, 479 (1996).

54 Ibid., 477

Byron Marchant,[55] Raymond Kurz and Celine Jimenez[56] have analyzed the current state of copyright law and how it has been applied to the Internet. They demonstrate that despite the ease of copying online and the need for some special definitions, existing legal principles can accommodate the Internet.[57]

Fred Cate applies existing obscenity law in the same manner, coming to the conclusion that the community standards of the *Miller* test[58] are relevant. In January, the United States Court of Appeals for the Sixth Circuit upheld the conviction of Robert and Carleen Thomas for making pornographic material available over the Internet.[59]

Three cases have supported the principle that if an online service provider serves as a screener of content, then it is responsible for copyright infringement and libel that a member may commit. If the access provider acts only as a conduit of information without screening content to and from members, it is not directly liable.

In the 1991 *Cubby, Inc. v. CompuServe Inc.* case, a New York District Court issued a summary judgment in CompuServe's favor after action was brought against the online service provider for alleged libel, business disparagement and unfair competition. CompuServe's Journalism Forum included a newsletter called Rumorville, USA, which was published by an independent third party who had agreed to accept "total responsibility for the contents" of the newsletter. The issue in question contained comments about a competing news source called Skuttlebut:

> The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville "through some back door"; a statement that (the publisher) was "bounced" from his previous

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55 Ibid.

56 Raymond A. Kurz and Celine M. Jimenez, "Copyrights On-Line," 39 *Howard Law Journal* 531, (1996).

57 Charles H. Kennedy, "Is the Internet a New Legal Frontier?" 39 *Howard Law Journal* 581, 581 (1996).

58 *Miller v. California* 413 U.S. 15 (1973).

59 74 F.3d 701; 1996 U.S. App.

employer, WABC; and a description of Skuttlebut as a "new start-up scam."[60]

CompuServe successfully argued that it provided its subscribers with access to an electronic library of news publications put together by independent third parties and loaded into its computer banks. Therefore, CompuServe acted as a distributor of information and could not be held liable for defamatory comments made in news publications absent a showing that it knew or had reason to know of defamation, disparagement or unfair competition. The court compared CompuServe to a library, book store or newsstand, each of which is not expected to know or control the content of the publications it distributes:

> First Amendment guarantees have long been recognized as protecting distributors of publications. ... Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment.[61]

Despite this precedent, in 1995, the New York Supreme Court granted only partial summary judgment to Prodigy Services Company against a complaint by Stratton Oakmont Inc. that it had been libeled by a Prodigy member's posting on its electronic bulletin board. The court found that Prodigy had employed an agent to control the content of the bulletin board, "expressly likening itself to a newspaper"[62] and therefore assuming responsibility for content:

> Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice. ... This decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences.[63]

In another 1995 case, *Religious Technology Center v. Netcom On-line Communication Services, Inc.*, a California District Court decided an Internet service

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60 776 F. Supp. 135, 138 (S.D. N.Y. 1991).

61 Ibid., 140 [quoting *Lerman v. Flynt Distributing Co.*, 745 F2d. 123, 139 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)].

62 *Stratton Oakmont Inc. v. Prodigy Services Co.*, 23 *Media Law Reporter* 1794, 1795 (1995).

63 Ibid., 1798.

provider did not directly infringe on a copyright when one of its users copied writings of the Church of Scientology in order to criticize them. The user posted information on a bulletin board operated out of the home of Thomas Klemesrud's, who accessed the Internet through Netcom.[64] The court cited *Playboy Enterprises, Inc. v. Frena* (1993) and *Sega Enterprises Ltd. v. MAPHIA* (1994), both of which released the online service providers from liability for direct copyright infringement when copying was performed by users without their knowledge.[65] In *Religious Technology*, however, the court ruled a question of contributory infringement was triable.[66]

Several years of public debate over if and how the Internet would be regulated by the government culminated with the passage of the Telecommunications Act of 1996. It incorporates ideas from many different individuals and groups, and predictably, some of it remains very controversial.

One early supporter of the bill was Richard Wiley, communications lawyer and former chairman of the FCC. Writing in the March 11, 1996, issue of *The National Law Review*, he hailed the Act as a sweeping move to reduce government regulation and increase competition among all electronic media. He focused on the technical restrictions of multiple and cross ownership of companies involved in electronic publishing, saying the deregulation will allow telephone companies and cable companies to reposition themselves and compete to provide better interactive access to the new interactive media.[67]

Despite its general tendency toward deregulation, he acknowledged, the Act contained two provisions that involved the government in regulation of content: The Act

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64 907 F. Supp. 1361, 1366 (N.D. Cal. 1995).

65 Ibid., 1370-71.

66 Ibid., 1383.

67 Richard E. Wiley, "Communications Law: By limiting regulation and encouraging competition, the new telecommunications act will be a communications industry watershed," *The National Law Journal*, March 11, 1996, p. B4.

called for a "V-chip" that could be programmed by parents to block violent or sexually explicit programming. The Act also prohibited any person from sending patently offensive communications to a minor via a computer or from making such communications generally available on the Internet. Critics claimed this last restriction would restrict the entire Internet to communications suitable for children. These content regulations were a part of the Telecommunications Act known as the Communications Decency Act.

House Speaker Newt Gingrich was highly critical of the Communications Decency Act that became law as part of the Telecommunications Act but was declared unconstitutional within a year of adoption:

> It is clearly a violation of free speech, and it's a violation of the right of adults to communicate with each other. I don't think it is a serious way to discuss a serious issue, which is how do you maintain the right of free speech for adults while also protecting children in a medium that is available to both?[68]

This debate over free expression focuses on the fact that some material on the Internet that is not appropriate for children is also not obscene to adults. Many Web pages are open to the public — no membership is required — and ensuring people accessing each page are adults would require screening software with access codes for each web page, causing additional costs, frustration and time delays. A foolproof security system may not even be possible.

Following the Congress' lead, Georgia enacted legislation that "criminalizes the use of an e-mail address that includes a name other than that of the mailbox owner, as well as the use of domain names and hyperlinks on a Web page without first obtaining permission from the owner of any included trademark, trade name, logo, legal or official seal, or copyright symbol."[69]

An opponent to these restrictions on free speech, Georgia state Rep. Mitchell Kaye,

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68 Newt Gingrich, quoted in Harvey Berkman, "Medium Is Message," *The National Law Journal*, August 19, 1996, p. A18.

69 Jeffrey R. Kuester, "Cyber-Sheriff's in Town," *The National Law Journal*, July 1, 1996, p. C1.

points out, "There are constitutional protections for those who write books under 'pen' names and those who distribute political flyers anonymously or through the use of newly-created 'front' organizations."[70] This law is sure to discourage Georgians from making their own Web pages.

**The Student Press**

Robert Reynolds, principle of Hazelwood East High School, censored two pages of the Spectrum, the high school newspaper, in 1983 because news stories on the pages identified a divorced parent, pregnant students, sexual activity and birth control.[71] Three students, including Cathy Kuhlmeier, filed suit in Federal District Court saying their First Amendment rights had been violated. The lower court ruled their rights as minors were not equal to adult rights and that the school district could censor the school paper so long as the action has "a substantial and reasonable basis."

The Court of Appeals sided with the students by basing its decision on the 1969 landmark Tinker v. Des Moines Independent School District, which had established that school officials could not censor student expression except when "necessary to avoid material and substantial interference with school work or discipline ... or the rights of others."[72] In the *Tinker* case, three public school students had been suspended for wearing black arm bands to school to protest the war in Vietnam in 1965. They ranged in age from 13 to 16, and the Supreme Court assured them of their First Amendment rights.

In 1988, the Supreme Court rejected the principles established by *Tinker* and decided in a 5-3 decision that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate

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70 Ibid., C8.

71 *Hazelwood School District v. Kuhlmeier* (1988).

72 *Tinker v. Des Moines Independent School District* (1969).

pedagogical concerns."[73] As public schools enter the information age — the age of media convergence and interactivity — they are forced to follow the principles of *Hazelwood* over those of *Tinker* to decide students' access to the Internet, which includes electronic research, writing, publishing and feedback from their audience. The following principles, extracted from each of the Supreme Court rulings, present the stark change in the government's attitude toward freedom of speech in public schools:

**Tinker (1969)**
1. Quietly and passively wearing armbands is protected speech under the First and Fourteenth Amendments.
2. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible.
3. Wearing armbands is divorced from actually or potentially disruptive conduct and is akin to "pure speech" which is entitled to comprehensive protection under the First Amendment.
4. Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.
5. Educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.
6. To justify censorship, a school must show that its action is caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.
7. School officials cannot suppress expression of feelings with which they do not wish to contend.
8. The mission of public schools is not to foster a homogeneous people.
9. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.
10. Intercommunication among the students is an important part of the educational process.

**Hazelwood (1988)**
1. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside of school.
2. School officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.
3. School newspapers must comply with the rules of fairness which are standard in the field of journalism.
4. First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings.
5. School newspapers promote the particular speech printed on their pages.
6. Schools may censor speech that is ungrammatical, poorly written, inadequately

[73] *Hazelwood*.

> researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.
> 7. A school must also retain the authority to refuse to sponsor student speech that reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order.

The college student press generally has not fallen under Hazelwood, but as student newspapers and broadcast stations continue to go online, the potential to censor grows dramatically because of most college's control over the computer networks that carry the student news media. For the first time, computing services policies are restricting students' ability to openly and freely research, write, publish and receive feedback from their audiences. Some computer services departments, seeking guidance for their policies, are discovering Hazelwood and using it to form Internet access policies.[74]

## Conclusions

The Colonial period of American history seems to have been dominated by a public life that featured a variety of ideas that were distributed through a newspapers, pamphlets and books and were freely discussed and debated among citizens. As American communicators moved into more sophisticated and unique channels, each with separate characteristics, problems and principles, specialized law and regulations were developed for each medium. Today, interactive communications media are blurring such distinctions, and laws must conform to a new reality.

Interactivity may help citizens return to a virtual public life that shares characteristics, definitions and ideas, including the idea of a marketplace of ideas. On the other hand, it may lead to government regulation of all news writers, including the traditionally free newspaper journalist. This is a question that the Supreme Court must answer within the next few years.

The Court must ultimately decide whether it will follow the principles of Hazelwood or of Reno as it adjusts medium-specific rulings of the past to media convergence of the

[74] John Bowen, "CyberLaw: Defining the Elusive Boundaries of a New Frontier," (panel presentation at the annual convention of AEJMC, Baltimore, 1998). Bowen is chair of the Journalism Education Association Scholastic Press Rights Commission.

future. It already has rejected the notion that adult citizens can be restricted from accessing information to the same extent as minors even though the Internet cannot distinguish the age of its users. This seems to have opened the Internet to minors although some school districts are restricting its use by students.[75]

As U.S. citizens rediscover the rough-and-tumble nature of public debate as it is reborn in electronic form, perhaps they also will rediscover the meaning of the First Amendment: "Congress shall make no law ... abridging the freedom of speech, or of the press ... ." As society decides if and how to regulate the Internet, it may reconsider some of its oldest principles. For example, one of the first expressions of free speech was written by John Milton in 1744:

> And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple, who ever knew Truth put to the wors, in a free and open encounter?[76]

The cases presented in this research indicate that the courts are applying traditional principles to the Internet with some success, but they also show that old definitions concerning mass media need adjustments as technical distinctions disappear. This is not cause to re-invent media law, but it is cause to reconsider through research the assumption that the government can regulate fairness and decency of speech between adult citizens using a mass medium that is based on a high level of interaction. Government control of electronic interaction, when there are a multitude of channels available, is contrary to the principle of free speech.

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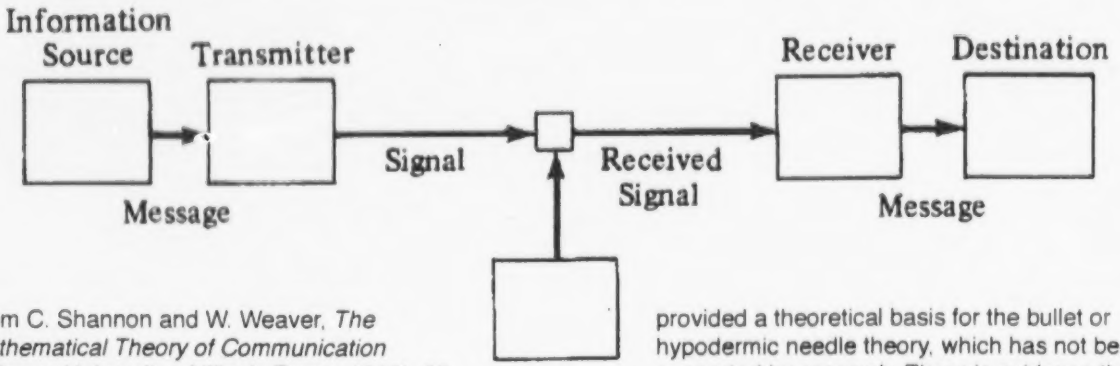
75 Ibid.

76 John Milton, "Areopagitica ," in *John Milton: Selected Prose*, ed. C.A. Patrides, revised edition (Columbia: University of Missouri Press, 1985), 242.

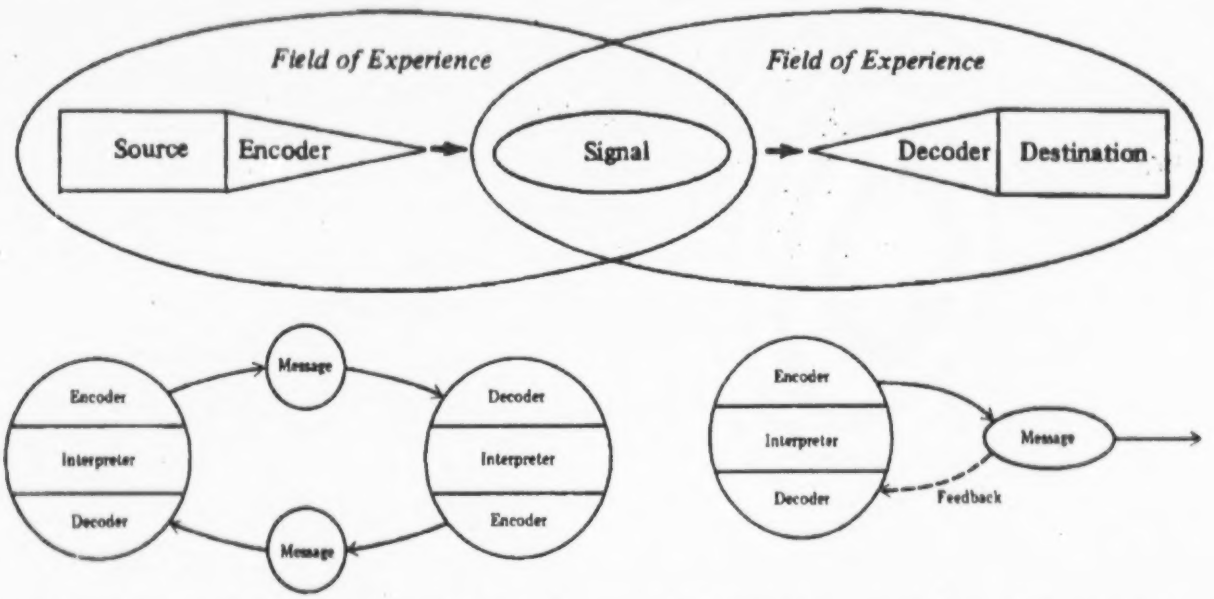
# Appendix A: The Shift from Product to Process

## The Delivery or Product Paradigm (1949)



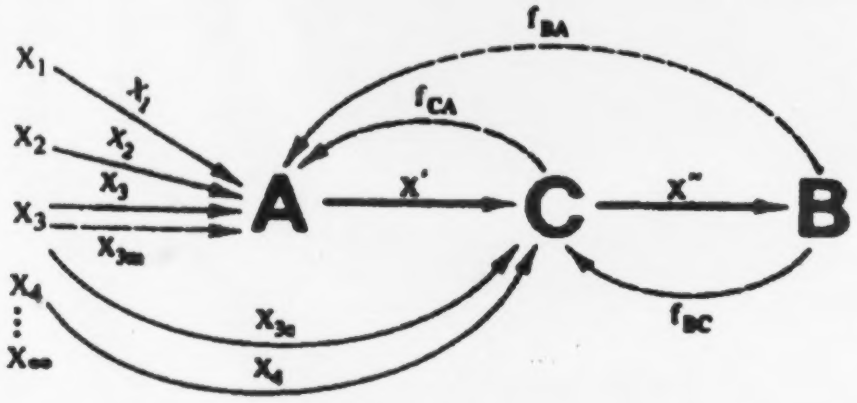

From C. Shannon and W. Weaver, *The Mathematical Theory of Communication* (Urbana: University of Illinois Press, 1949), 98; reprinted in Werner J. Severin and James W. Tankard, *Communication Theories: Origins, Methods, and Uses*, 3rd ed. (Longman: NY, 1992) 39. This model, which treats information as a physical object rather than knowledge, provided a theoretical basis for the bullet or hypodermic needle theory, which has not been supported by research. There is evidence that this model is the reigning paradigm of traditional American news media. It focuses on delivery of a product, a common management term for the news, and it uses terms that broadcasters commonly use to describe their equipment.

## The Shared Signal Model (1954)



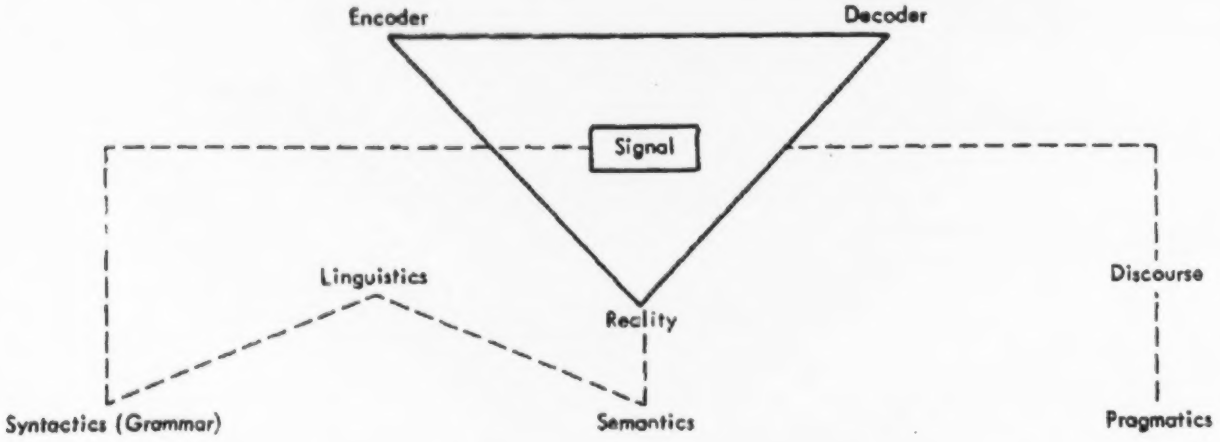

Wilbur Schramm, *The Process and Effects of Mass Communication* (Urbana: University of Illinois Press, 1954), reprinted in C. David Mortensen, *Basic Readings in Communication Theory* (New York: Harper & Row, 1973), 31-35. The sender and receiver of a message must share common meanings for the signal to understand each other. They reach common meanings through two kinds of feedback: a message from the receiver to the sender, and message from the sender to herself when she reads her own message. This latter kind of feedback is closely related to symbolic interaction.

# The ABCX Feedback Model (1957)




From Bruce H. Wesley and Malcomb S. MacLean, Jr., "A Conceptual Model for Communication Research," *Journalism Quarterly* 34 (1957): 31-38. According to this model, an active communicator A purposely transmits a message to a behavioral receiver B through an editor or a media channel C. The message is affected by objects and events "out there," denoted as Xs, and by feedback from Bs, denoted by Fs. The model provokes important scrutiny of the role of Cs in communication, which underlies the gatekeeping hypothesis, but it precludes first-hand knowledge of Xs or second-hand knowledge of Xs from other sources for B.

# The Communication Triangle Model (1971)




From James Kinneavy, *A Theory of Discourse* (New York: W.W. Norton, 1971), 25: "Basic to all uses of language are a person, who encodes a message, the signal (language) which carries the message, the reality to which the message refers, and the decoder (receiver of the message)." According to this model, linguistics is the study of the signal and its relationship to reality while discourse is the process of communication that connects writers, readers and the world of objects and actions.



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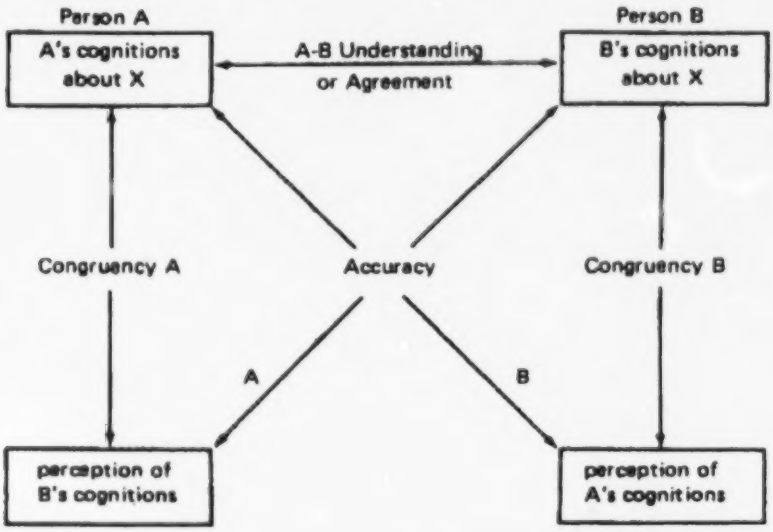
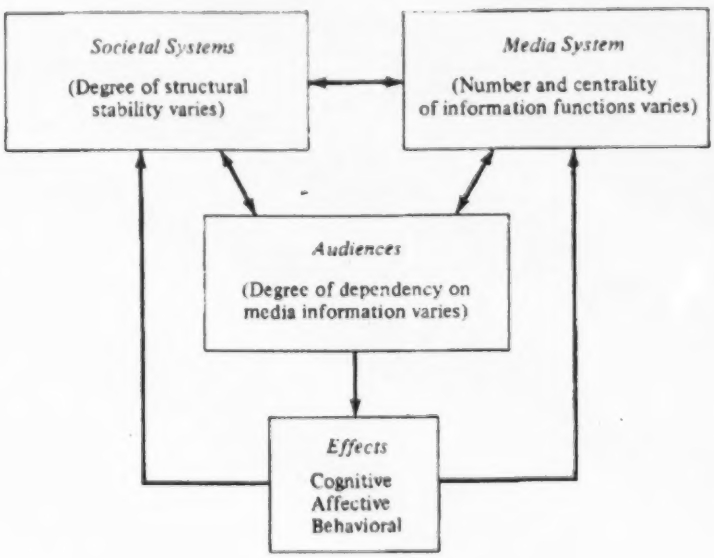
# The Coorientation Model (1973)




From Jack M. McLeod and Steven H. Chaffee, "Interpersonal Approaches to Communication Research," *American Behavioral Scientist* 16 (March-April 1973): 469-499. Coorientation attempts to measure communication effectiveness. It suggests that accuracy of communication can be measured by comparing A's cognitions about Xs with B's perception of A's cognitions about Xs and vice versa.

# The Media Dependency Model (1976)




From S.J. Ball-Rokeach and M.L. DeFleur,"A Dependency Model of Mass-Media Effects," *Communication Research* 3 (1976): 8; reprinted in *DeFleur and Ball-Rokeach, Communication Theories*, 263. The dependency or process paradigm owes much to several media effects theories, including conflict, structural-functional and symbolic interaction. It illustrates how research can indicate strong effects in some cases and weak effects in others. In dependency theory, the strength of the effect depends on the outcome of interactions between people involved in the communication process. Dependency theory can be applied at the micro level (reporter-reader-event) or macro level (media system-audiences-societal systems). The process paradigm makes feedback the focus of effective communication.



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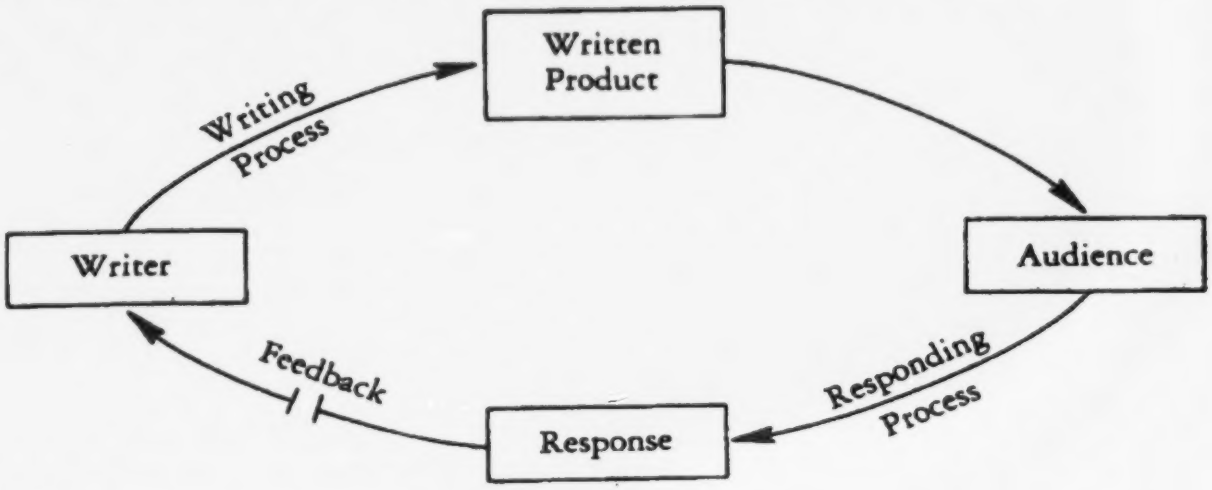
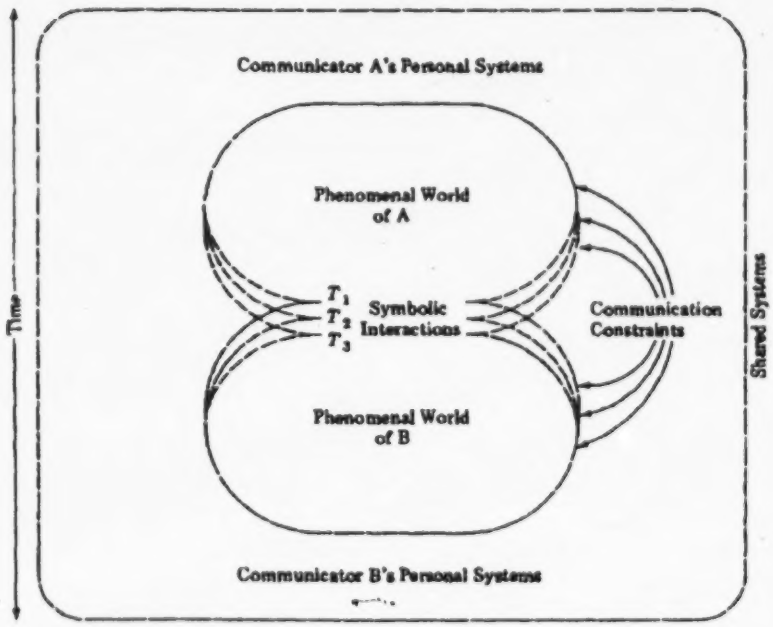
# The Audience Response Model (1979)




Ruth Mitchell and Mary Taylor, "The Integrating Perspective: An Audience-Reponse Model for Writing," *College English*, 41 (November, 1979), 250; reprinted in Lisa Ede and Andrea Lunsford, "Audience Addressed/Audience Invoked: The Role of Audience in Composition Theory and Pedagogy," Gary Tate, Edward Corbett and Nancy Myers, ed., *The Writing Teacher's Sourcebook*, 3d ed., (New York: Oxford University Press, 1994), 246. This is a practical model, but Ede and Ludsford pointed out that it did not account for the writer's imagined or "ivoked" audience during the revision process. This is another reference to the social psychology of symbolic interaction.

# The Interaction or Process Paradigm (1992)




From Julia T. Wood, *Spinning the Symbolic Web: Human Communication and Symbolic Interaction* (Norwood, N.J: Ablex Publishing Corporation, 1992), 26. Communication constraints prevent minds from interacting directly. Symbolic interactions are sign systems developed to overcome the constraints. By creating external signs and gauging reactions from others, the mind constructs symbolic internal knowledge about "personal systems" of others. Language represents the most elaborate and commonly used sign system. Symbolic interaction is compatible with empiricism, the belief that knowledge is created through sensory experience, and social construction of meaning, the belief that knowledge is negotiated by members of a community.



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